

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

UNITED STATES OF AMERICA,

Plaintiff,

v.

**No. 16-cv-0165 MV/SMV
08-cr-0777 MV**

RICKY SALAZAR,

Defendant.

ORDER APPOINTING COUNSEL

THIS MATTER is before the Court on two motions related to appointment of counsel for Defendant Salazar. [CV Docs. 8, 9; CR Docs. 68, 69]. The Court will grant attorney Marcia J. Milner's motion to withdraw as counsel for Defendant Salazar. *See* [CV Doc. 9; CR Doc. 69]. Further, pursuant to 18 U.S.C. § 3006A, the Court will grant Defendant's requests for appointment of another attorney who is experienced in federal habeas motions. [CV Docs. 8, 9; CR Docs. 68, 69].

Background

Defendant Salazar pleaded guilty to a Possession with Intent to Distribute 5 Grams or More of Methamphetamine on August 31, 2009. [CR Doc. 46]. He was sentenced on February 11, 2010, to a term of 144 months' imprisonment, 4 years of supervised release, and a special assessment of \$100. [CR Doc. 52] at 1–3, 5. He filed no appeal.

On August 21, 2015, Defendant, proceeding pro se, filed a Motion for Reduction of Sentence Pursuant to 18 U.S.C. § 3582(c)(2). [CR Doc. 57]. He argued that he should be

resentenced in light of Amendment 782 to the Federal Sentencing Guidelines. *Id.* Attorney Milner was appointed to represent him on August 26, 2015.¹ [Doc. 58].

Despite the appointment of counsel, Defendant continued to submit filings pro se. *See* [CR Docs. 60–63]. Eventually, on March 7, 2016, Defendant (acting pro se) asked to withdraw his § 3582 motion because he believed the proper avenue for relief would be a motion under 28 U.S.C. § 2255 and *Johnson v. United States*, 135 S. Ct. 2551 (2015). [CR Docs. 62, 63; CV Doc. 1].

The Court ordered the United States to respond to the § 2255 motion, and the response was filed on April 4, 2016. [CV Doc. 5; CR Doc. 65]. Defendant filed his pro se reply on April 13, 2016. [CV Doc. 7; CR Doc. 67]. Soon thereafter, Attorney Milner moved to withdraw. Defendant requests appointment of substitute counsel who is experienced in § 2255 motions. [CV Docs. 8, 9; CR Docs. 68, 69].

Discussion

There is no constitutional right to counsel in habeas proceedings. *Coronado v. Ward*, 517 F.3d 1212, 1218 (10th Cir. 2008). Instead, whether to appoint counsel is a matter left to the discretion of the court. *Swazo v. Wyo. Dep’t of Corr.*, 23 F.3d 332, 333 (10th Cir. 1994). In so deciding, courts should consider “the merits of the litigant’s claims, the nature of the factual issues raised in the claims, the litigant’s ability to present his claims, and the complexity of the legal issues raised by the claims.” *Rucks v. Boergermann*, 57 F.3d 978, 979 (10th Cir. 1995) (internal quotation marks omitted). Ultimately, the burden is on the movant “to convince the

¹ Ms. Milner explained that on November 18, 2015, United States Probation Officer David Mills submitted a Memorandum to the presiding judge, stating that because Defendant was sentenced as a Career Offender pursuant to U.S.S.G § 4B1.1, his total offense level was not affected by Amendment 782. Probation Officer Mills concluded that Defendant was not eligible for any sentence reduction under § 3582. *See* [CV Doc. 9] at 1–2; [CR Doc. 69] at 1–2. Defendant’s pro se motion under § 3582 remains pending. [CR Doc. 57].

court that there is sufficient merit to his claim to warrant the appointment of counsel.” *Hill v. Smithkline Beecham Corp.*, 393 F.3d 1111, 1115 (10th Cir 2004) (internal quotation marks omitted). Under the circumstances in this case, the Court finds it appropriate to appoint counsel to represent Defendant Salazar.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that Attorney Marcia J. Milner’s Motion to Withdraw as Counsel [CV Doc. 9, CR Doc. 69] is **GRANTED**.

IT IS FURTHER ORDERED that Defendant’s motions to appoint counsel [CV Docs. 8, 9; CR Docs. 68, 69] are **GRANTED**. Counsel is appointed consistent with the requirements of 18 U.S.C. § 3006A and this Court’s relevant policies.

IT IS SO ORDERED.



STEPHAN M. VIDMAR
United States Magistrate Judge